

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Petition of Blackstone Gas Company	)	
pursuant to General Laws Chapter 164, § 94,	)	
and 220 C.M.R. §§ 5.00 et seq., for a General	)	D.T.E. 01-50
Increase in Gas Rates.	)	
	)	

**THE ATTORNEY GENERAL’S OBJECTION  
TO BLACKSTONE’S MOTION TO SUPPLEMENT THE RECORD AND  
CROSS MOTION TO STRIKE PORTIONS OF THE COMPANY’S  
INITIAL BRIEF, OR IN THE ALTERNATIVE, TO REOPEN THE RECORD**

\_\_\_\_\_The Attorney General hereby (1) objects to the Motion to Supplement the Record (“Motion”) of Blackstone Gas Company (“Blackstone” or the “Company”) by which the Company seeks to admit into evidence the purported Affidavit of James Wojcik (“Affidavit”); and (2) moves, pursuant to Mass.R.Civ.P. 12 and 220 C.M.R. §§ 1.04(5) and 1.11(7) and (8), that the Department of Telecommunications and Energy (“Department”) strike the relevant portions of the Company’s Initial Brief which reference extra-record evidence and testimony contained in the Affidavit; or in the alternative, (3) reopen the record to allow discovery with respect to extra-record evidence and testimony contained in the Affidavit. In support thereof, the Attorney General states:

**I. INTRODUCTION**

On October 1, 2001, Blackstone filed its Initial Brief accompanied by a Motion to Supplement the Record and Affidavit of James Wojcik concerning the allocation of officer’s salaries and benefits.<sup>1</sup> Blackstone seeks to reopen the record in order to present evidence on the

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<sup>1</sup> The Attorney General notes that the “affidavit” filed with the Department is unsigned and directly contracts the Company’s Federal Tax Return, the Company’s Annual Reports the Department and the sworn testimony of the Company’s witnesses. *See* Attorney General’s Reply Brief, pp. 8-10. Mr.

allocation of salary and benefits of Company officers between the gas company and its unregulated sales and service division. In support of its Motion, Blackstone contends that the Attorney General raised the issue of the allocation of officers' salaries and benefits for the first time in his Initial Brief after the close of hearings.

The Attorney General submits that Blackstone's contentions lack merit and constitute new testimony and arguments that are unsupported by the record. The numerous statements contained in the purported Affidavit are inaccurate or are otherwise directly contradicted by the record evidence before the Department.<sup>2</sup>

## **II. STANDARD OF REVIEW**

The Department's rules provide that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). Good cause for purposes of reopening has been defined as a showing that the proponent has previously unknown or undisclosed information regarding a material issue that would be likely to have a significant impact on the decision already rendered. *Machise v. New England Telephone and Telegraph Company*, D.P.U. 87-AD-12-B at 4-7 (1990); *Boston Gas Company*, D.P.U. 88-67(Phase II) at 7 (1989); *Tennessee*

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Wojcik's failure to sign the purported Affidavit should cause the Department to reject summarily Blackstone's Motion.

<sup>2</sup> Specifically, and to summarize, Mr. Wojcik alleges in the unsworn Affidavit (1) that his wife, as Clerk, does no work for the unregulated division and that accordingly, none of her salary is allocated to that division; and (2) that he draws a salary of \$150 per week for the less than two hours per week of work he performs for the unregulated division and that none of his salary is allocated to the unregulated division.

*Gas Pipeline Company*, D.P.U. 85-207-A at 11-12 (1986).<sup>3</sup>

Department precedent requires rejection of new testimony and arguments based thereon in a party's briefs. Department precedent establishes that the proper procedure is to "strike extra-record evidence from a brief and require the offending party to file a conforming brief without reference to the excluded evidence." *Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980). The Department has also used an alternative approach of "[striking] the offending portions from the brief and [] disregard those portions of the brief in reaching a decision in the case." *AT&T Communications*, D.P.U. 91-79, p. 8 (1992), citing *Service Publications Inc. v. Goverman*, 396 Mass. 567, 580 (1986); *Hull Municipal Light Plant*, D.P.U. 87-19-A, p. 7 (1990); *Boston Edison Company*, D.P.U. 90-335, pp. 7-9 (1992).

### **III. ARGUMENT**

#### **1. The Unsworn Extra-Record Evidence And Testimony Contained In The Affidavit Is Not Extraordinary, New, Nor Previously Unknown.**

The unsworn purported Affidavit which Blackstone seeks to have admitted into record evidence contains extra-record statements that do not constitute extraordinary information. The Company has not established that there is new evidence concerning the allocation of officer's salaries that has come to light or that there is new evidence that was not known to it when the record was still open. The Company has the burden of establishing the level of employee salaries

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<sup>3</sup> Department "case law on late-filed exhibits is based upon the premise that late-filed exhibits are prejudicial because other parties do not have the opportunity to conduct cross-examination regarding information contained in late-filed exhibits in order to test the accuracy of the data through the litigation process." *New England Telephone and Telegraph Company*, d/b/a/ NYNEX, D.P.U. 94-50 at 62 (1995). Hence, only in limited circumstances has the Department found good cause to permit the submission of evidentiary documents into evidence following the close of evidentiary hearings. See *Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991) (fundamentally unfair to admit evidence not subject to cross examination).

to be included in rates.

In *Petition of Cambridge Electric Light Company*, D.P.U. 92-15, p. 2 (1992), the Department found good cause to admit certain evidence subsequent to the close of the hearings, noting that “the evidence sought to be introduced by Cambridge Electric [was] in the nature of new information obtained after the close of hearings and provide[d] current information on the Company’s operations.” The evidence that Blackstone seeks to introduce does not involve current operations but rather historical information that could have been provided during the hearings and subject to cross examination. Information concerning the time various employees spent working for the Company’s divisions was clearly known at the time this rate case was filed. Therefore, the Department should deny Blackstone’s Motion to Supplement the Record.

**2. The Department Should Strike The Relevant Offending Portions Of The Company’s Initial Brief.**

The Attorney General requests that the Department strike Part II, Section D, Subsection 4 (entitled “Allocation of Officers’ Salaries and Benefits”) of the Company’s Initial Brief because it cites, references or otherwise relies upon extra-record testimony contained in the purported Affidavit. Numerous statements contained in the purported Affidavit are not supported by the record and in fact are directly contradicted by the record. *See* Attorney General’s Reply Brief, pp. 8-10 (Affidavit directly contracts the Company’s Federal Tax Return, the Company’s Annual Reports the Department and the sworn testimony of the Company’s witness). Allowing Blackstone to cite, reference or otherwise rely upon extra-record testimony violates the Attorney General’s due process rights and the Department rules and precedent. *See MediaOne/New England Telephone*, D.T.E. 99-42/43, p. 17-18 (1999); *Boston Edison Company*, D.P.U. 90-335,

p. 7-8 (1992); *Payphone Inc.*, D.P.U. 90-171, p. 4-5 (1991); *see also* G.L. c. 30A, § 11; and 220 C.M.R. §§ 1.11(4), 1.11(7); and 1.11(8). Accordingly, those relevant offending portions of the Company's Initial Brief should be stricken from the record. *See Boston Edison Company v. Brookline Realty & Inv. Corp.*, 10 Mass.App.Ct. 63, 69 (1980).

**3. Blackstone Was Put On Notice Of The Issue Of Allocation Of Officers' Salaries and Benefits.**

Throughout this proceeding, Blackstone was on notice that the allocation of costs between Blackstone and Blackstone Sales and Service ( the "Affiliate") was an issue.

Department precedent holds that "the filing of a general rate case places a company on notice that every element of the rate request is at issue." *Boston Gas Company*, D.P.U. 96-50-C (Phase I), p. 46 (1997) *citing Bay State Gas Company*, D.P.U. 1535-A at 17 (1983). Additionally, the Company's contention that the Attorney General raised the issue of the allocation of officers' salaries and benefits for the first time in his Initial Brief after the close of hearings lacks merit.

The Attorney General asked the following questions regarding Mr. Wojcik's compensation, costs allocated to the utility's affiliate, and employees of the affiliated during the discovery phase of this case, and those inquiries together with the related responses were all entered as exhibits in this case:

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|---------|---|
| AG-1-14 | Asking for a description of all contracts between the utility and its affiliates              |
| AG-1-15 | Asking for all allocations and assignments of costs from the utility to any of its affiliates |
| AG-1-16 | Asking for the allocations and assignments of costs from any affiliates to the utility        |
| AG-1-24 | Asking for the compensation of all officers of the utility                                    |

AG-1-32	Asking for a history of the number of employees at the utility
AG-3-4	Asking for the financial statements of the affiliate along with a description of the sales and service provided by the affiliate
AG-3-5	Asking for the number of employees of the affiliate
AG-3-6	Asking for allocation formulas for all costs allocated to the affiliate
RR-AG-9	Asking for the revenue ratio used to allocate joint expenses between the utility and its affiliate
RR-AG-10	Asking whether the cost of employee benefits had been allocated to the affiliate

The Attorney General also cross-examined the Company's witnesses regarding costs and cost allocations to the affiliate regarding these issues. *See* Tr. 1. pp. 58-59 and pp. 73-77 and pp. 86-92; *see also Boston Gas Company*, D.P.U. 96-50-C (Phase I) at 46.

Accordingly, the Department should deny Blackstone's Motion and strike the relevant portions of the Company's Initial Brief which reference extra-record testimony contained in the purported Affidavit attached with the Motion.

#### **4. The Record Evidence In This Case Directly Contradicts The Unsworn Statements In The Affidavit.**

Exhibit AG-1-69 provides the Year 2000 U.S. Corporation Tax Return for Blackstone Gas Company which is filed in consolidated form with both the gas distribution company and its affiliate Sales and Services Corporation. Tr. 1, p. 58. The "Compensation of officers" shown on page 1, line 12 is \$76,113. This amount is also shown on page 2, Schedule E, line 1, indicating the "Amount of Compensation" for James A. Wojcik of \$76,113. Therefore, for purposes of

reporting to the I.R.S., the total compensation that Mr. Wojcik receives from the combined operations of the Company and the Affiliate is \$76,113.

Exhibit AG-1-24 asks the Company to itemize and quantify the Company's management and officer compensation. The response there is that the president of the company receives the same amount of \$76,113. There is no mention of allocation or assignment of that compensation to the Affiliate.

Furthermore, the Company's year 2000 Annual Return to the Department has on page 4, the Principal and Salaried Officers' Annual Salaries. [A copy of this page has been appended to the Motion.]. Here, the amount for the President, James A. Wojcik is \$76,113, the same as in the tax form for the combined companies and the same as the response in Exhibit AG-1-24, and the Clerk of the Company, Grace Wojcik has an Annual Salary of \$25,015. It should also be noted that the Company's witness also made clear that the salaries of the its affiliate were not included in the reporting the amounts in the year 2000 Annual Return to the Department. *See* Tr. 1, pp. 58-59.

Finally, when asked about the allocation of costs from the utility to the affiliate, the Company responded that no salaries and wage costs were allocated. Blackstone clearly indicated that there were only two full time employees at the affiliate. Exh. AG-3-6. The two employees are an office employee, Melissa with a salary of \$20,243 and an outside service employee, Larry with a salary of \$30,403. *Id.* These are the **only** two salaries reported on the affiliates income statements. *See* Exh. AG-3-4, page 3, the Sales and Services Division, Operating Expenses, for the Years Ended December 31, 2000 which indicates Office Salaries of \$20,243 and Service and Maintenance Salaries of \$30,403.

All of the above information was provided under sworn testimony. None of its was amended, corrected, or changed in anyway by the Company on the record. These types of discrepancies between the unsworn statements in the purported Affidavit which are directly contradicted by the record evidence before the Department. For all the above-stated reasons, the Department should deny Blackstone's Motion and strike the relevant portions of the Company's Initial Brief which reference extra-record testimony contained in the purported Affidavit attached with the Motion.

**WHEREFORE** the Attorney General requests:

1. That the Department deny the Company's Motion to Supplement the Record with a purported Affidavit of James Wojcik ("Affidavit");
2. That the Department strike the relevant offending portions of the Company's Initial Brief and disregard those portions of the Initial Brief in reaching a decision as described above;
3. In the alternative to the above-requested relief, reopen the record in this case to allow additional discovery; the taking of new evidence, new hearings; and the filing of supplemental briefs in connection with the many issues that the purported Affidavit raises; and
4. For such further relief that is just and proper.

Very truly yours,

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